90-165

Supreme Court, U.S.
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NO. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

ROBERT LANE WISE, Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF NORTH CAROLINA

Thomas K. Spence
81 McCachern Blvd. SE
Concord, North Carolina 28025
Counsel of Record and
Counsel for Petitioner

Kenneth B. Cruse
Of Counsel

QUESTIONS PRESENTED

(1) Does the due process clause of the Fourteenth Amendment to the Constitution of the United States permit an unqualified witness to testify as an expert in support of the credibility of a prosecuting witness who has been shown to be a liar in the matter at hand?

(2) Does a state criminal trial judge have the right, under the Sixth and Fourteenth Amendments to the Constitution of the United States, to retreat from the courtroom and to conduct critical stages of the trial proceedings in camera and to the exclusion of both the defendant and the court reporter?

(3) Does the highest appellate court of a state, in direct violation of the equal protection provision of the Fourteenth Amendment to the Constitution

of the United States, have the right to selectively assume, in direct violation of its own rules of appellate procedure and of the legislative laws of the state, jurisdiction to grant discretionary review of a lower appellate court's decision?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

ROBERT LANE WISE, Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The petitioner, Robert Lane Wise, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina, entered in the above entitled proceeding on 25 April 1990.

OPINIONS BELOW

The opinion of the Court of Appeals of North Carolina is reported at 93 N.C. App. 305, 377 S.E.2d 769 (1989), and is reprinted in the appendix hereto, page

A-6, infra.

The opinion of the Supreme Court of North Carolina is reported at 326 N.C. 421, ____ S.E.2d _____ (1990), and is reprinted in the appendix hereto, p. A-21, infra.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 1257(3).

The judgment of the Supreme Court of North Carolina overruling the unanimous decision of the Court of Appeals of North Carolina was entered on 25 April 1990 after having been filed on 5 April 1990. Under North Carolina law as set forth in Rule 32(b) of the North Carolina Rules of Appellate Procedure, the actual judgment of the Supreme Court of North Carolina is

entered onto the docket by the clerk twenty days after the date of the filing of the opinion.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

The VI and XIV Amendments to the Constitution of the United States, (see Appendix, p. A-55); N. C. Gen. Stat. Sec. 7A-31(c), (see Appendix, p. A-20); N. C. Gen. Stat. Sec. 15A-1231(b), (see Appendix, p. A-56).

STATEMENT OF THE CASE

On 5 April 1990, the Supreme Court of North Carolina, in an opinion that was filed on 25 April 1990, overturned a judgment of the Court of Appeals of North Carolina, which judgment had granted the petitioner herein a new trial with regard to a mandatory life sentence that he had received in the Superior Court of Cabarrus County, North Carolina on 21 January 1988 on a conviction of first degree rape.

At the original trial the petitioner herein had stood charged with two counts of first degree rape of the same prosecutrix; it having been alleged by the State that he had violated NCGS 14-27.2(a)(1) on 14 June 1986 and again on 30 May 1987. The cases were consolidated for trial; and, the petitioner was found

not guilty as to the alleged 1986 offense and guilty as to the alleged 1987 offense.

The State presented evidence at the trial that, with regard to the alleged 1987 offense, the petitioner had in May had sexual relations with the twelve-year old prosecutrix. Further evidence was presented by the State that the alleged offenses were not reported by the prosecutrix to an adult until the summer of 1987. The prosecutrix had claimed to report the problem to two younger persons, neither of whom were summoned by the State to testify at the trial. During the whole time involved, the prosecutrix was living with her mother and step-father. The investigating officer did not interview either of the young persons who had, allegedly, been

informed by the prosecutrix, but did interview the parents of one--the parents saying that the alleged informee did not remember being told of the alleged incident by the prosecutrix.

The matter at hand came to the attention of authorities when the prosecutrix, in the summer of 1987, told the wife of the minister of her church of the allegations at hand. The noted wife was the leader of a church youth group which the prosecutrix had been attending two to four times a week in the year preceding the summer of 1987. During that year, the witness had seen the prosecutrix regularly and there had been no indication that anything was wrong.

The mother of the prosecutrix did not learn of the alleged situation from her

daughter, but from the above noted minister's wife.

The only medical evidence offered by the State at the trial was from a physician who was not the first doctor to examine the prosecutrix in the matter at hand. The first physician to examine the prosecutrix was never called to testify by the State and the failure to call him was never explained. The physician who was called to testify stated that he had examined the prosecutrix on 29 June 1987, that there had been vaginal penetration, that he could not tell what type of penetration it was, and that the penetration could have been consistent with the use of a vibrator or practically any projectile or anything that could have been put there. The testifying physician further testified that the

prosecutrix had previously been seen by another doctor, but that he did not know the identity of such doctor. He did testify that tests had been performed by the previously examining physician, but that he did not have the results of such tests.

The State presented a self-described professional counselor to testify. This person testified that the prosecutrix had changed her story as to an alleged slapping incident by the petitioner in the premises.

The witness, who was not originally tendered by the State as an expert, testified extensively on direct examination, and, then the prosecution eventually sought expert testimony from her, stood challenged by the petitioner as to her status as an expert. The trial

judge never made a specific ruling on the witness' status or non-status as an expert. The witness testified that she had found the witness "genuine" during their counseling sessions, to which the petitioner objected. The trial judge did not rule on the objection, and, the witness went on to testify, over further objection by the petitioner, that over half of the cases of rape are family oriented and that children who are sexually abused at an early age grow up in dysfunctional families, and that such goes to explain why a child would go back to a situation where sexual abuse had occurred.

The witness stated that the prosecutrix had changed her story about being slapped by the petitioner, but that such changes could be attributed tc guilt

feelings that a child has over sexual abuse.

At this point, petitioner's trial counsel objected to the entire line of questioning on the basis that the witness had not been qualified as an expert. The State then tendered the witness as an expert. The witness was examined by counsel for the petitioner, objections to her status were raised, and the trial judge overruled the objections.

At no point did the trial judge indicate the field of expertise in which the witness qualified as an expert.

The witness then went on to testify that a child would return to a sexual abuse situation because they do not believe anything abnormal has occurred or that it will not happen again. The witness went on to testify that when the

child does learn such conduct is abnormal, the child feels very guilty about it and will not tell anybody about the abuse. The witness testified that this was not a hypothetical situation, but that it occurs in almost every case of abuse. The witness then went on to testify that she believed there had definitely been sexual abuse in this case. Petitioner's counsel objected and moved to strike. The trial judge did not issue a ruling.

The State rested, and the petitioner's motion to dismiss was denied, and the petitioner proceeded to put on his evidence. The petitioner's wife testified that she and her husband lived down the road from the prosecutrix and that she saw the prosecutrix almost every day during the summer of 1986 and through

the early summer of 1987. She testified that the prosecutrix "has a habit of telling untruths".

Following the close of all of the evidence, the trial judge, assistant district attorney, and petitioner's trial counsel then held an unrecorded charge conference in the judge's chambers; both the defendant and the court reporter being excluded from the conference.

The trial judge, upon his return from the in camera charge conference, informed the court reporter and the petitioner only that he would make the standard charge to the jury.

The trial judge failed to charge on either the failure of the State to produce evidence or on the ease of charging or difficulty of defending alleged sexual offenses.

As noted above, petitioner was found not guilty as to the alleged 30 May 1987 offense and guilty of the alleged 14 June 1986 offense. The trial judge then imposed a mandatory life sentence and the petitioner appealed to the North Carolina Court of Appeals.

On the noted appeal, petitioner's trial counsel was replaced by petitioner's current counsel. The trial counsel did not participate in the appeal. Petitioner's appellate counsel had not participated in the trial.

On the noted appeal, petitioner presented nine assignments of error as appear in the appendix to this petition. The North Carolina Court of Appeals found that "only defendant's Third Assignment of Error merits discussion. Insofar as

the others are concerned, they are overruled."

In his third Assignment of Error, the petitioner had contended that there was error in "The Court's allowing a purported expert witness who had interviewed the purported victim to testify that, in effect, the purported victim was telling the truth."

The North Carolina Court of Appeals awarded the petitioner a new trial, noting in its opinion that the State's case rested on the credibility of the prosecutrix, the lack of corroborating evidence, the existence of inconsistency in the statements of the prosecutrix, and the effect of the "genuine" statement by the witness coming only moments after her detailed recounting of the alleged rape

on 14 June 1986 as told to her by the prosecutrix.

Following the entry of the judgment of the North Carolina Court of Appeals, the State filed a petition for discretionary review under NCGS 7A-31 contending that if such judgment were allowed to stand, "it will create an issue of significant legal principle which has major significance to the jurisprudence of North Carolina case law. Moreover, execution of the Court's judgment in this case will result in unnecessary, expensive and burdensome proceedings clearly wasteful of precious judicial resources."

The petitioner herein filed a response to the State's petition noting that "...NCGS 7A-31(c) requires that...'Interlocutory determinations by

the Court of Appeals, including orders remanding the cause for a new trial...shall be certified for review by the Supreme Court only when a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.'"

Notwithstanding the failure of the State to include in its petition a basis for making the mandatory determination, and without making the determination, the Supreme Court of North Carolina allowed the petition of the State.

After successive delays sought and obtained by the State, the matter was heard.

As a part of his response to the State's petition for discretionary review, petitioner herein had included on

cross-appeal the questions presented to the intermediate appellate court and set forth in the appendix herein.

Prior to the hearing in the Supreme Court, the State attempted, without success, to add additional materials to the trial record with the suggestion that such would be an amendment.

In its consideration of the matter, the Supreme Court overruled the petitioner herein on each of his positions and, with regard to the credibility support-"genuine" problem noted that the counselor's response was merely a description of her observation of the victim's emotional state.

The North Carolina Supreme Court rejected each of the remaining points raised by the petitioner herein as

appears of record in the opinion of that Court set forth in the appendix hereto.

The decision of the Court of Appeals of North Carolina was reversed and the matter remanded to that Court for remand to the trial court for reinstatement of the life sentence.

Rule 31(g) of the North Carolina Rules of Appellate Procedure provides that the courts will not entertain petitions for rehearing in criminal actions.

In connection with Rule 14(h) of the Rules of this Court, it is noted that:

The problem as to Question One at hand was first raised in the trial court by trial counsel's objection to the question and answer on page 81 of the trial transcript. See appendix, page A-3. There was no ruling by the trial court on the objection. The same problem

arose again on pages 83 and 85 of the trial transcript. See appendix at pages A-4 and A-5.

The problem was again brought up by the petitioner by his appellate counsel in the North Carolina Court of Appeals by posing the question on page 12 of the Record on Appeal in that Court. The Court of Appeals allowed a new trial on the point. The problem was taken on cross-appeal to the Supreme Court of North Carolina when discretionary review was granted to the State. See appendix hereto at page A-1. The matter was discussed in this petitioner's brief in the Supreme Court. That court ruled against petitioner.

As to Question Two, the problem was first raised by appellate counsel in the North Carolina Court of Appeals by

assignment of error in the record (see appendix at page A-1), and discussed in this petitioner's brief in that court. When a judge acts in contravention of a statute to the prejudice of a party, the right to appeal is preserved notwithstanding the failure to enter an objection. State v. Ashe, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

This petitioner's argument was rejected by that court in its opinion (see page A-14 of the appendix hereto). The problem was taken by cross-appeal to the Supreme Court (see appendix at page A-23), was discussed by this petitioner in his brief in that court and in his reply brief. That court ruled against petitioner (see appendix hereto at page A-21).

As to Question Three, the problem was first raised by this petitioner in his response to the State's petition for discretionary review (see herein at page A-19) The point was not discussed nor passed upon by the Supreme Court of North Carolina in that Court's order allowing review.

REASONS FOR GRANTING THE WRIT

I.

The matter at hand is substantially more than a legal exercise. A father of several children, whose wife and eldest child testified for him at the trial, and who had been granted a new trial by the intermediate state appellate court, is presently serving a life sentence on the basically uncorroborated testimony of a proven liar.

II.

With regard to the first question presented to this Court in the petition in the present matter, it is noted that in granting a new trial, the Court of Appeals ruled that Mason, a counselor to whom the prosecuting witness had been referred and who was later submitted as an expert witness, gave improper expert

testimony vouching for the credibility of the prosecuting witness which constituted reversible error. That testimony was in response to the prosecutor's question asking Mason to describe the emotional state of the prosecutrix during these counseling sessions and while she was describing the alleged sexual conduct by the defendant. Mason responded that she was "genuine" (T p. 81). The Court of Appeals ruled that this testimony violated NCGS 8C-1, Rules 405(a) and 608(a) which prohibit the admission of expert testimony on the credibility of a witness. This error was found to be grounds for a new trial because the credibility of the prosecuting witness and the defendant were critical issues.

It is by now clear that expert witnesses, particularly those testifying

in sexual offense cases involving children, may not offer their opinions as to the believability or truthfulness of the child making the allegations. State v. Kim, 318 N.C. 614, 350 S.E.2d 347, 351 (1986); State v. Heath, 316 N.C. 337, 341 S.E.2d 565, 567-68 (1986). N.C.G.S. 8C-1, Rules 608(a) and 405(a), although allowing opinion evidence of a witness' credibility, make clear that expert testimony on the credibility of a witness is inadmissible. State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76, 81 (1986); accord State v. Jenkins, 318 N.C. 687, 351 S.E.2d 299, 304 (1986); State v. Holloway, supra, 347 S.E.2d at 73. Mason's opinion that the prosecuting witness was "genuine" during their counseling sessions where the allegations of sexual misconduct were discussed had

the obvious effect of bolstering the witness' credibility.

The context of the question indicated to the jury that Mason was attesting to the believability of the witness' allegations of sexual abuse. Prior to the inadmissible response the following exchange took place between Mason and the prosecutor:

Q Did you engage also in a conversation concerning what had occurred on May 30, 1987?

A I did not. All I have recorded is May 30th, same warehouse.

Q So you didn't ask her specifically about individual, just in general?

A Right. She was referred to me through victims' assistance. I was in a counseling--that was the way I perceived it, as far as a counseling endeavor.

Q Now ma'am, could you describe her emotionally when she was telling you these things during these counseling sessions?

A Genuine.

As pointed out in the Court of Appeals' opinion, "it is also important to note that Mrs. Mason's response came only moments after her detailed recounting of the alleged rape on 14 June 1986 as told to her by the prosecutrix. Thus it improperly gave credibility to the prosecutrix's testimony concerning that incident". This conclusion is eminently correct since Mason's testimony up to the point of her "genuine" remark dealt with the prosecuting witness's allegations of misconduct by the defendant, so Mason's statement that the witness was genuine could only have been interpreted by the jury as an expert opinion on the veracity of the witness. By focusing only on the precise question and the answer given by Mason, the State ignored the true import of the "genuine"

statement, when taken in context clearly bore on the prosecuting witness's credibility.

Under N.C.G.S. 8C-1, Rule 702 (1988), if specialized knowledge will assist the trier of fact to understand the evidence or an issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." Generally, a witness qualifies as an expert under this rule if the witness has acquired such skill that he or she is better qualified that the jury to form an opinion on the particular subject. State v. Goodwin, 320 N.C. 147, 357 S.E.2d 639, 641 (1987). The question of whether a witness qualifies as an expert is one of fact that should be determined by the

trial Court. State v. Bullard, 312 N.C. 129, 322 S.E.2d 370, 376 (1984).

Gail Mason, a counselor, was allowed to testify at trial. Initially, Mason was not offered by the State as an expert witness, but when the defendant objected to testimony that she gave that constituted expert opinions concerning child sexual abuse victims, the State tendered her as an expert. After examining Mason as to her qualifications, the defendant renewed his objection as to her testifying as an expert, but this objection was overruled. However, at no point did the trial court make a finding that Mason qualified as expert or that her expertise was in any particular field. Mason went on to give more opinion testimony, including statements explaining why the prosecuting witness

might have gone back to the defendant's home after the alleged incidents and that she definitely thought there had been sexual abuse in this case.

Allowing Mason to give expert opinion testimony without making a finding as to her qualifications as an expert in any particular field was an error. In its decisions, the Court of Appeals stated that the finding of a witness to be an expert can be deemed implicit from the fact that the trial court allowed the opinion testimony. However, the cases cited for this proposition by the Court of Appeals hold that "[i]n the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter{.}"

State v. Perry, 275 N.C. 565, 169 S.E.2d 839, 844 (1969) (emphasis added). In this case, the defendant did request that a finding be made with respect to Mason by objecting to her testimony and requesting that an examination of her qualifications be held. When an objection is made to an expert, the party offering the expert should request a finding of his or her qualifications, and if there is no such finding that the witness is qualified exclusion of the testimony is warranted. Brandis on North Carolina Evidence Sec. 133, p. 597 (1988).

The trial court should not have admitted Mason's testimony absent a specific finding that she was an expert and the field in which she qualified. It was ruled that it was prejudicial error

for the trial court to allow a witness in a prosecution for sexual molestation of a child to give expert opinion testimony that the victim suffered from a syndrome resulting from sexual abuse where there was no proper finding that the witness qualified as an expert in the appropriate field. Mason was allowed to give testimony explaining away impeaching aspects of the prosecuting witness's conduct, as well as an ultimate opinion that the witness was a victim of sexual abuse, even though she was never found to be an expert in an appropriate field. Such evidence was certainly prejudicial to the defendant, and its admission requires that new trial be granted.

The due process clause of the Fourteenth Amendment does not permit the complained of testimony presented by the

prosecution at the trial of the petitioner. Due process demands that deprivation of liberty may not be accomplished without the presentation of evidence in accord with established rules.

III.

With regard to the second question presented to this Court, the in camera jury instruction hearings to the exclusion of the reporter and the petitioner herein created serious right to be present and right to effective appellate review problems under the Sixth and Fourteenth Amendments.

N.C.G.S. Sec. 15A-1231(b) (1988), provides that "[b]efore the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury." Such statutory

language makes clear that the charge conference "must" be recorded.

Despite the obvious mandatory requirement of this section, as evidenced by the legislature's change in wording, the charge conference in the present case was not recorded by the trial court, a clear violation of the statute.

Although N.C.G.S. Sec. 15A-1231(b) also requires some showing of prejudice for failure to comply fully with the section to be grounds for appeal, such prejudice is apparent here since the failure to record the charging conference prevented the defendant from presenting any errors occurring during the charge conference. That a defendant is unable to obtain effective appellate review because of omissions from the transcript is a proper basis for granting a new

trial. The trial court's failure to comply with Sec. 15A-1231(b) effectively pretermitted the defendant's right to claim certain errors occurring during the charge conference, thereby prejudicing his right to an effective appeal and justifying reversal of the conviction.

In United States vs. Selva, 559 F2 1303 (1977), the necessity arose of facing the problem of whether a criminal defendant, represented (as here) on appeal by new counsel, must demonstrate specific prejudice resulting from the failure to record a significant portion of a trial proceeding in order to prevail on appeal. The court ruled that there was no such burden on defendant-appellant and referred to the Court Reporter Act set forth in 28 USC in Section 753.

Such Act mandates and requires that a report "shall record verbatim by shorthand or by mechanical means...(1) all proceedings in criminal cases had in open court...". It is further noted that the requirements of the referred to federal act are, as are the requirements of N.C.G.S. 15A-1231(b), mandatory. It is unquestioned that a criminal defendant has a due process right to be present at all critical stages of the proceedings against him. See Kentucky v. Stincer, 197 S. Ct. 2658, 2667 (1987).

Furthermore, the mere absence of the defendant from the conference cannot be considered to be a waiver of the right to be present. "In felony cases other than capital ones the right to present [sic] can be waived only by the party himself." State v. Montgomery, 33 N.C. App. 693,

236 S.E.2d 390, 391, cert. denied, 293 N.C. 256, 237 S.E.2d 258 (1977).

The right to be present at one's criminal trial is a condition of due process, certainly when absence of the defendant from the proceedings, or, as in this case, the absence of the proceedings from the defendant and the reporter, thwarts a fair and just hearing and appeal.

IV.

With regard to the third question presented, the actions of the Supreme Court of North Carolina, in granting discretionary review, in themselves violated the petitioner's federal constitutional rights to equal protection and due process.

The Fourteenth Amendment prevents the states from depriving a person of equal protection under the law.

Appellate review problems of equal protection nature similar to the one at hand have come before the courts before. Discriminatory allowance as would be discriminatory denial of review procedures should be a violation of the equal protection clause.

There was direct and discriminatory error by the Supreme Court of North Carolina in allowing the State's petition for discretionary review in the matter at hand in that there was reversal of an order for a new trial when there was neither suggestion by the State nor finding by the reversing court that "...failure to certify would cause a delay in final adjudication which would

probably result in substantial harm..." Such finding is mandated by N.C.G.S. 7A-31(c)(3). See appendix, page A-56.

The petitioner herein has not enjoyed equal protection with other persons who have been awarded a new trial by the intermediate appellate court.

Where a statute, as here, prescribes a mode for the acquisition of jurisdiction by a court, that mode must be followed, or the proceedings and any resulting judgment will be null and void. In the present matter the prescribed mode was followed by neither the State nor the Supreme Court of North Carolina.

CONCLUSION

Therefore, petitioner respectfully requests that this Court grant the petition, issue the writ of certiorari and summarily reverse the sentence entered against the petitioner. Alternatively, petitioner respectfully requests that this Court grant the petition, issue the writ of certiorari, vacate the decision of the Supreme Court of North Carolina and order remand to the Court of Appeals of North Carolina for remand to the Superior Court of Cabarrus County, North Carolina for new trial.

Respectfully submitted,

Thomas K. Spence
CRUSE AND SPENCE
81 McCachern Boulevard
Concord, North Carolina 28025
Telephone: (704) 782-2614
Counsel of Record

Kenneth B. Cruse
Of Counsel

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No. 8819SC615 NINETEEN-A DISTRICT

NORTH CAROLINA COURT OF APPEALS

* * * * * * * * * * * * * * * * * * * *

STATE OF NORTH CAROLINA)
)
V.) From Cabarrus
)
ROBERT LANE WISE)

* * * * * * * * * * * * * * * * * * * *

DEFENDANT-APPELLANT'S BRIEF

* * * * * * * * * * * * * * * * * * * *

QUESTIONS PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR FAILING TO ALLOW APPROPRIATE CROSS EXAMINATION OF THE PROSECUTRIX AS TO HER FAILURE TO BE TRUTHFUL IN THE PREMISES?

II. WAS THERE REVERSIBLE ERROR ON THE PART OF THE PROSECUTION IN FAILING TO SUPPLY DISCOVERY REQUESTED BY THE DEFENDANT, PRIOR TO TRIAL, SPECIFICALLY WITH REGARD TO DEFENDANT'S REQUEST FOR EXCULPATORY MATERIALS, WHICH MATERIALS WOULD HAVE PROPERLY INCLUDED WRITINGS MADE BY THE INITIAL EXAMINING PHYSICIAN IN THE PREMISES?

III. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN ALLOWING A PURPORTED EXPERT WITNESS WHO HAD INTERVIEWED THE PURPORTED VICTIM TO TESTIFY THAT, IN EFFECT, THE PURPORTED VICTIM WAS TELLING THE TRUTH?

IV. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN FAILING TO ALLOW APPROPRIATE IMPEACHMENT BY THE DEFENDANT OF THE PROSECUTRIX?

V. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN ALLOWING INAPPROPRIATE OPINION TESTIMONY FROM A TENDERED BUT NOT PROPERLY QUALIFIED EXPERT WITNESS?

VI. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN HOLDING AN UNRECORDED CHARGE CONFERENCE CONTRARY TO THE REQUIREMENTS OF N.C.G.S. 15A 1231(b)?

VII. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN HOLDING THE CHARGE CONFERENCE IN THE PREMISES IN CHAMBERS AND OUTSIDE OF THE PRESENCE OF THE DEFENDANT CONTRARY TO APPLICABLE CONSTITUTIONAL REQUIREMENTS?

VIII. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN FAILING TO CHARGE ON THE EFFECT OF THE STATE'S FAILURE TO PRODUCE EVIDENCE?

IX. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN FAILING TO CHARGE ON THE EASE OF ASSERTING SEXUAL OFFENSES AND THE INHERENT DIFFICULTIES OF DEFENDING THEM?

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Q. Did you engage her also in a conversation concerning what had occurred on May 30, 1987?

A. I did not. All I have recorded is May 30th, same warehouse.

Q. So you didn't ask her specifically about individual, just in general.

A. Right. She was referred to me through victim's assistance. I was in a counseling--that was the way I perceived it, as far as a counseling endeavor.

Q. Now ma'am, could you describe her emotionally when she was telling you these things during these counseling sessions?

A. Genuine.

MR. SHERRILL: Objection.

Q. In your training have you received instructions as to whether or not these children avoid or go back to the person who they--is the molestor?
A. Yes, they do. Particularly if it is a family setting. Over half of the rape cases committed are---
MR. SHERRILL: Objection.
A. ---family oriented. They know their perpetrator.

MR. SHERRILL: Your Honor, I move to strike any---

A. Okay, but to my knowledge he did not slap her, and this was her story on 1-16, everything else was fact...

NO. 8819SC615

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 1989

STATE OF NORTH CAROLINA

v. Cabarrus County
No. 87CRS5643

ROBERT LANE WISE

Appeal by defendant from Collier, Robert A., Jr., Judge. Judgment entered 21 January 1988 in Superior Court, Cabarrus County. Heard in the Court of Appeals 23 January 1989.

Defendant Robert Lane Wise was tried before a jury on two separate indictments charging first degree rape of a twelve-year old girl in violation of G.S. sec. 14-27.2(a)(1). The jury convicted the defendant of the rape which allegedly occurred on 14 June 1986, and found him not guilty of the charge stemming from

the May 30 1987 allegations. The trial judge imposed a mandatory life sentence for conviction of the 14 June 1986 offense, and defendant gave notice of appeal in open court.

Attorney General Lacy H. Thornburg, by Associate Attorney General Katherine R. White, for the State.

Cruse and Spence, by Kenneth B. Cruse and Thomas K. Spence, for defendant-appellant.

JOHNSON, Judge.

The State's prosecuting witness testified to the following. Defendant is the step-uncle and neighbor of the prosecutrix. On 14 June 1986, defendant asked the prosecutrix to come to his house to babysit. When she arrived he asked her to accompany him to a storage building about five minutes away by car

to help him pick up something. Defendant's two-year old son went with the two to the warehouse, but remained asleep in defendant's van. After defendant and the prosecutrix got the item and walked to one end of the warehouse, the prosecutrix fell. At that point defendant held the child down on the floor by putting his knee on her stomach while pulling her shorts off. Defendant then proceeded to have sexual intercourse with the prosecutrix. The child waited until the defendant left and then put on her clothes and went home.

In June or July of 1987, the prosecutrix confided to the leader of her church youth group, Nadine Wilcox, that the defendant had had sexual intercourse with her. Mrs. Wilcox informed the

prosecutrix's mother, and the defendant was subsequently charged with rape.

Defendant denied all of the allegations against him and testified that he was working at his job as manager of the Country Barn, a facility for lease to private groups for social functions, on 14 June 1986.

We find that only defendant's third Assignment of Error merits discussion. Insofar as the others are concerned, they are overruled.

By his third Assignment of Error, defendant contends that the trial court committed reversible error in allowing an expert witness who had interviewed the prosecutrix to testify that, in effect, the prosecutrix was telling the truth.

Gail Kay Mason, a professional counselor who worked with the prosecutrix

during the investigation of the case, testified for the State. We note at the outset that the State's attorney did not initially tender Mrs. Mason as an expert in counseling children, nor did the court specifically find her to be an expert. After the witness had testified extensively on direct examination, defense counsel challenged Mrs. Mason's status as an expert and was allowed to question her about her qualifications. Although the court did not then specifically find Mrs. Mason to be an expert in counseling children, defendant's objection to her testimony was overruled. Our perusal of the record indicates that the witness Mason was qualified as an expert. In the absence of a special request that a court expressly find that a witness is

qualified as an expert, that finding will be deemed implicit in the court's admitting the witness' testimony. State v. Perry, 275 N.C. 565, 169 S.E.2d 839 (1969); State v. Perry, 69 N.C. App. 477, 317 S.E.2d 428 (1984). We believe that the situation before us falls under this general rule, and that the trial court may be deemed to have implicitly accepted Mrs. Mason as a witness by admitting her testimony.

In her testimony Mrs. Mason gave a detailed statement from her notes of what the prosecutrix told her in a counseling session concerning the alleged 14 June 1986 incident. The following interchange between the State's attorney and Mrs. Mason then occurred.

> Q Did you engage her also in a conversation concerning what occurred on May 30, 1987?

A I did not. All I have recorded is May 30, same warehouse.

Q So you didn't ask her specifically about individual, just general.

A Right. She was referred to me through victim's assistance. I was in a counseling--that was the way I perceived it, as far as a counseling endeavor.

Q Now ma'am, could you describe her emotionally when she was telling you these things during these counseling sessions?

A Genuine.

Although defense counsel objected to the witness' description of the prosecutrix during counseling sessions as "genuine", the court did not rule on the objection.

Defendant contends that Mrs. Mason's statement amounted to an expert opinion that the prosecutrix was telling the truth and violated G.S. sec 8C-1, Rules 405 and 608, of the North Carolina Rules

of Evidence. We agree that the response was improper.

G.S. sec 8C-1, Rule 405(a) provides in part that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." In addition, G.S. sec. 8C-1, Rule 608(a) states partially that "[t]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a),..." In observing the relation between the two rules of evidence, the commentary to Rule 608 states that "[t]he reference to Rule 405(a) is to make it clear that expert testimony on the credibility of a witness is not admissible." Our Supreme Court has upheld the mandate of Rules 405(a) and 608 in holding that expert opinion is

inadmissible as it relates to the credibility of a witness. State v. Kim, 318 N.C. 614, 350 S.E.2d 347 (1986); State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986); State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986).

In the case sub judice, Mrs. Mason's testimony that the prosecutrix was "genuine" when talking to her in counseling sessions clearly bore on the prosecutrix's credibility. The question which elicited her response, which inquired about the child's emotional state during the sessions, was not improper. It did, however, squarely invoke the witness' status as a professional. Her answer that the child was genuine, though unresponsive to the question, undoubtedly had the effect of establishing that the prosecutrix was

telling the truth. Kim, supra. It is also important that Mrs. Mason's response came only moments after her detailed recounting of the alleged rape on 14 June 1986 as told to her by the prosecutrix. Thus it improperly gave credibility to the prosecutrix's testimony concerning that incident. Id.

Having decided that the counselor's statement was improper, we must now determine whether the error was prejudicial to defendant so as to merit a new trial. To demonstrate prejudice, a defendant must show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial ..." G.S. sec. 15A-1443(a); State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, writ denied, appeal dismissed, disc.

rev. denied, 320 N.C. 175, 358 S.E.2d 66-67 (1987). We believe the contested statement meets this standard and was therefore prejudicial to the defendant.

The State's case rested on the credibility of the prosecutrix. She did not report the incident in question until about a year after it allegedly occurred. Therefore, there was no medical evidence directly implicating the defendant. Although a physician who examined the prosecutrix on 29 June 1987 testified that there was evidence of penetration, he could not conclude that the prosecutrix had actually had sexual intercourse. Further, there was some inconsistency in the prosecutrix's statements. In one session with Mrs. Mason she claimed that the defendant slapped her and threatened her verbally

on 14 June 1986. The child later told the counselor that the slapping and threat never occurred. The prosecutrix also admitted at trial that she had lied earlier under oath when she claimed that she did not understand certain language allegedly used by defendant on 14 June 1986.

This trial was basically a matter of the prosecutrix's accusations against the defendant's denials. The credibility of each was critical. When Mrs. Mason declared the prosecutrix to be "genuine" she invaded the jury's province as sole fact finder to the prejudice of the defendant. Further, this comment stood without any instruction by the court to ignore it as to the prosecutrix's credibility. Under these facts, we conclude that in the absence of the

challenged testimony there is a reasonable possibility that a different result would have been reached.

For the foregoing reasons we hold that defendant is entitled to a New trial.

Judges WELLS and BECTON concur.

ORDER OF STATE SUPREME COURT

ALLOWING REVIEW

ORDER

Upon consideration of the petition filed by Attorney General in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 4th day of May 1989.
s/ Whichard, J.
For the Court"

Therefore this case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

WITNESS my hand and seal of the Supreme Court of North Carolina, this the 4th day of May, 1989.

J. GREGORY WALLACE
Clerk of the Supreme Court

s/ Peggy N. Byrd
Assistant Clerk

N.C.G.S. 7A-31

..."...Interlocutory determinations by the Court of Appeals, including orders for a new trial...shall be certified for review by the Supreme Court only by a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm."

IN THE SUPREME COURT OF NORTH CAROLINA

No. 161PA89-Cabarrus

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
ROBERT LANE WISE	)

On appeal and discretionary review pursuant to N.C.G.S. sec 7A-31 of the decision of the Court of Appeals, 93 N.C. App. 305, 377 S.E.2d 769 (1989), setting aside a judgment entered by Collier, J., in Superior Court, Cabarrus County, on 19 January 1988 and awarding defendant a new trial. Heard in the Supreme Court 12 December 1989.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State-appellant.

Cruse and Spence, by Thomas K. Spence and Kenneth B. Cruse, for defendant-appellee.

MEYER, Justice.

On 5 October 1987, the Grand Jury of Cabarrus County returned two bills of indictment against the defendant, one charging first-degree rape occurring on 14 June 1986 and the other charging the same offense occurring on 30 May 1987. The cases were consolidated for trial, and the jury found defendant guilty only of the rape occurring on 14 June 1986. The trial judge imposed a mandatory life sentence. Defendant appealed to the Court of Appeals, which concluded that the trial court improperly admitted expert opinion testimony and ordered a new trial on that basis. This Court granted the State's petition for discretionary review on 4 May 1989. In the appellee's response to the State's petition for discretionary review, eight additional points of error were assigned

as cross-assignments of error for consideration before the Court of Appeals and were summarily overruled by that court. For reasons stated subsequently, we review these cross-assignments of error.

The State's evidence tended to show that on 14 June 1986 defendant, the victim's step-uncle and neighbor, asked the victim, an eleven-year-old girl, to come to his home to baby-sit his young son. When she arrived, he asked her to accompany him to a warehouse to help him pick up something. After they had obtained the item and had walked to one end of the warehouse, the victim fell. At that point, defendant held her down on the floor, took off her shorts, and proceeded to engage in sexual intercourse with her. The victim also testified, not

to the jury's satisfaction, that the defendant again raped her in the warehouse on 30 May 1987. In June or July of 1987, the victim confided in her pastor's wife and told her of the incidents. The pastor's wife in turn informed the victim's mother of the incidents. Defendant was subsequently charged with two counts of rape. His defenses to both charges were denial and alibi.

The victim was examined by two doctors, Dr. Furr and Dr. Oliver, both of whom indicated that her vagina had been sexually penetrated. Dr. Oliver testified at trial regarding his physical examination of the child. Gail Mason, a professional counselor who worked with the victim during the investigation of the case, also testified for the State.

Her testimony formed the basis for the holding of the Court of Appeals and is the subject of the State's present assignment of error.

Mason testified with regard to what the victim told her in counseling sessions concerning the two alleged incidents. During the course of the direct examination, the following exchange took place between the prosecutor and the witness:

> A. ...[The victim] was referred to me through victims' assistance. I was in a counseling--that was the way I perceived it, as far as a counseling endeavor.
>
> Q. Now ma'am, could you describe her emotionally when she was telling you these things during these counseling sessions?
>
> A. Genuine.
>
> [DEFENSE COUNSEL]: Objection.
>
> A. Emotionally. Emotional. Not extremely emotional as far

> a crying, not furious, anger, related the story, there were tears, there was sadness, but not extreme.
>
> Q. What else did you note about her emotionally when she told you these things?
>
> A. That she was hurting inside and feeling very guilty.

We note at the outset that defendant's objection is not properly preserved and that it came after the witness' answer and was not followed by a motion to strike. When an objection is not timely made, it is waived. State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978). We nevertheless elect to address this issue.

In its opinion, the Court of Appeals held that the word "genuine" in response to the question asking the witness to describe the victim emotionally amounted to an expert opinion that the victim was

telling the truth and therefore violated Rule 405(a) and 608(a) of the North Carolina Rules of Evidence. Because we are convinced that the answer was not a comment upon the credibility of the victim, but rather a description of the witness' observation of the victim's emotional state during the counseling session, we reverse the holding of the Court of Appeals and remand the case for reinstatement of the judgment of the trial court.

The law in this state with regard to the scope of expert opinion testimony as to a witness' credibility is well settled. Rule 405(a) of the North Carolina Rules of Evidence, which governs methods of proving character, provides in part that "[e]xpert testimony on character or a trait of character is not

admissible as circumstantial evidence on behavior." Rule 608(a) addresses impeachment and rehabilitation of a witness' credibility and provides that "[t]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a)." The reference to Rule 405(a) was inserted in this rule to make it clear that expert testimony as to the credibility of a witness is not admissible. State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986), appeal on remand, 322 N.C. 818, 370 S.E.2d 676 (1988). As the Court of Appeals pointed out below, this Court has prohibited expert opinion testimony as to the credibility of a witness on more than one occasion.

In State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986), this Court held that the trial court erroneously permitted the prosecutor to pose a question to an expert in clinical psychology regarding whether the thirteen-year old victim was suffering from a mental condition which might cause her to fabricate a story about an alleged sexual assault. This Court further concluded that it was error for the trial court to permit the expert witness to testify that "[t]here is nothing in the record or current behavior that indicates that [the victim] has a record of lying." Id. at 340, 341 S.E.2d at 567.

In State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76, this Court held that the following examination of an expert pediatrician was improper:

> Q. ... [D]id you form an opinion about whether [the victim] was believable or not?
> "....
> "A. I think she's believable."

Id. at 599, 350 S.E.2d at 81.

In State v. Kim, 318 N.C. 614, 350 S.E.2d 347 (1986), this Court concluded that the following testimony was an improper expression of expert opinion on the credibility of a witness:

> "Q. Dr. Barnette, as you evaluated and treated [the victim], did you ever find her untruthful with you?
>
> "[DEFENSE COUNSEL]: OBJECTION.
>
> "COURT: OVERRULED.
>
> "A. She's never been untruthful with me about it. Everything she had to say to me somehow I'd find out later that she was telling the truth."

Id. at 619-20, 350 S.E.2d at 350-51.

However, we are not convinced that the testimony at issue in the case sub judice falls within the Rules'

prohibitions as illustrated by the above examples. When asked to "describe her [the victim] emotionally" while she was telling her story during the counseling sessions, the witness responded, "Genuine." The witness was testifying that the emotions of the victim during the counseling session were genuine emotions. The victim was described as tearful and sad, but not angry or overly distraught. The witness was not testifying that she believed what the victim told her was true, nor did she give her opinion as to the victim's character for truthfulness in general. She merely described her personal observations concerning the emotions of the victim during the counseling sessions.

Such a response is proper under this Court's decision in State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987). In that case, a psychologist testified that a victim responded on a psychological test in an "honest fashion...admitting that she was in a fair amount of emotional distress.'" Id. at 30, 357 S.E.2d at 365. This Court held:

> We do not consider the testimony of this witness...to be an expert opinion as to [the victim's] character or credibility. It was merely a statement of opinion by a trained professional based upon personal knowledge and professional expertise that the test results were reliable because the victim seemed to respond to the questions in an honest fashion....By this answer [the doctor] was not saying that she believed the victim to be truthful, but rather that she gave truthful answers to the test questions.

Id. at 31, 357 S.E.2d at 366.

The Court concluded in that case that "[t]he mental and emotional state of the victim before, during and after the offenses as well as her intelligence, although not elements of the crime, are relevant factors to be considered by the jury in arriving at its verdicts." Id. at 30-31, 357 S.E.2d at 366.

We have reviewed the transcript of this witness' testimony and we are convinced that the counselor's response to the prosecutor's question was merely a description of her observation of the victim's emotional state during the sessions. We therefore hold that the Court of Appeals erred in granting the defendant a new trial on this basis, and the decision of that court is reversed.

Because this holding has the effect of reinstating defendant's sentence, we

now review his cross-assignments of error to determine if they have merit. Our review of the record reveals that defendant, as appellee, has properly preserved these questions in his response to the State's petition for discretionary review under the provisions of Rule 15(d) of the North Carolina Rules of Appellate Procedure. This Court has recognized that allowing cross-assignments of error "provides protection for appellees who have been deprived in the trial court of an alternative basis in law on which their favorable judgment could be supported, and who face the possibility that on appeal prejudicial error will be found in the ground on which their judgment was actually based." Carawan v. Tate, 304 N.C. 696, 701, 286 S.E.2d 99, 102 (1982). We have conducted a thorough

review of the record and the briefs, and, for the reasons stated below, we conclude that defendant received a fair trial free of prejudicial error.

Defendant first assigns error to the trial court's decision to sustain a State objection to defense counsel's questioning of the victim regarding a prior inconsistent statement. During her direct examination, the victim testified that she periodically visited defendant's home because she received attention from the defendant that she did not get at home. Later, she testified that she was in fact getting attention at home. During cross-examination of the witness, defense counsel attempted to ask her whether her earlier statement was true, and the trial court sustained the State's objection to this question.

Defendant contends that it was his constitutional right to impeach the witness through questioning about prior inconsistent statements. The State responds that its objection was properly sustained because the question was argumentative and because the ruling was within the trial court's discretion to prevent harassment of witnesses. We agree. Rule 611(a) of the North Carolina Rules of Evidence provides that the trial court shall have complete discretion to control the trial and to protect witnesses from harassment. The question at issue herein, "So what you're saying earlier wasn't true?" was an argumentative restatement of counsel's previous question. The court sustained no other objections by the State. We perceive no abuse of discretion in the

trial court's ruling. We therefore reject this assignment of error.

Defendant's next assignment of error relates to the prosecutor's failure to disclose the results of the first medical examination performed on the victim. It is well established under Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), that the federal constitutional guarantee of due process requires that the State disclose to a criminal defendant exculpatory evidence within its knowledge or possession. This rule applies regardless of whether there has been a specific request for the evidence. United States v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342 (1976).

Drs. Furr and Oliver examined the prosecuting witness. While the State presented the testimony of Dr. Oliver, it

neither disclosed nor presented the results of Dr. Furr's examination, which was performed prior to Dr. Oliver's examination. Defendant contends that because the State did not offer the results of that examination, it can be inferred that they were exculpatory and that defendant is therefore entitled to a new trial.

The State counters that the Brady mandate applies only to exculpatory information of which the defendant has no knowledge. In this case, the trial transcript reveals that defense counsel was aware of Dr. Furr's examination and the results thereof. During cross-examination, defense counsel asked the victim whether she was examined by Dr. Furr, and she responded affirmatively. Further, defense counsel had a copy of

Dr. Oliver's report, which set out the victim's history, including the fact that she had been examined by a doctor who had also performed a pelvic examination prior to Dr. Oliver's examination.

Because defense counsel had in his possession a copy of Dr. Oliver's report and because defense counsel knew the name of the other physician, Dr. Furr, defendant has failed to make a showing that the State withheld exculpatory evidence by failing to offer either Dr. Furr's testimony or the results of his examination. Defendant could have been subpoenaed Dr. Furr to testify at trial. We reject this assignment of error.

Defendant next contends that the trial court erred in allowing Gail Mason, the counselor, to testify as an expert when in fact she was never properly

qualified as an expert. Initially, Mason was not offered by the State as an expert witness, and it was not until redirect examination of Mason by the State that defense counsel objected to testimony that she gave that constituted an expert opinion:

> A. Children, if sexual abuse occurs at an early age, even before this incident, and they grow up in dysfunctional families or environments, the reason she would go back to a situation, if indeed it did happen, the reason the child would go back to that---
>
> [DEFENSE COUNSEL]: Your Honor, I'm going to object, this is an opinion---
>
> A. It's not an opinion, it's a fact. After a lot of study. It's a fact.
>
> THE COURT: She's entitled as an expert.
>
> [DEFENSE COUNSEL]: I don't think she's been qualified as an expert.
>
> [PROSECUTOR]: I tender her.

THE COURT: You wish to cross-examine her as to her qualifications?

On recross-examination, defense counsel questioned Mason as to her qualifications and then renewed his objection. This objection was overruled. Defendant points out that at no time did the trial court rule on the prosecutor's tender or make a finding that Mason qualified as an expert and that such omission constituted reversible error.

The State counters, and we agree, that the trial court's overruling of defense counsel's objection to the opinion testimony constituted an implicit finding that the witness was an expert. We find our holding in State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984), instructive on this issue. In that case, we held that the trial court did not err

in permitting an anthropologist to testify as an expert in bare footprint comparison, where the trial judge implicitly found that the witness was qualified when he overruled defense counsel's objection to State's offer of the witness as an expert in the comparison of footprint impressions and where there was evidence to support a finding by the trial judge that the witness was qualified to testify as an expert in footprint comparison.

In the instant case, as in Bullard, defendant interposed only general objections to the testimony which is the subject of this assignment of error. He never requested a specific finding by the trial court as to the witness' qualifications as an expert. In the absence of such a request, a finding that

the witness is qualified as an expert is implicit in the trial court's ruling admitting the opinion testimony. State v. Perry, 275 N.C. 565, 169 S.E.2d 839 (1969).

We further hold that there was no need for the court to make a formal ruling that the witness was an expert because her qualifications had already been presented to the court. In State v. Aguallo, 322 N.C. 818, 370 S.E.2d 676 (1988), this Court held that the trial court properly admitted testimony of a law enforcement officer and a Department of Social Services worker who gave opinions as to characteristics of abused children. The Court found that "[i]t is evident that the nature of their jobs and the experience which they possessed made them better qualified that the jury to

form an opinion as to the characteristics of abused children." Id. at 821, 370 S.E.2d at 677. That Court relied on State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1123, 51 L. Ed. 2d 573 (1977), in which two agents for the State Bureau of Investigation who had not been formally qualified as experts were nevertheless permitted to give their opinions concerning a gun residue test because the nature of their jobs and their experience made them better qualified than the jury to form an opinion on this matter.

Similarly, the evidence of the nature of Mason's job and of the experience which she possesses affirmatively shows that she was better qualified than the jury to form an opinion as to, and to testify about, the

characteristics of abused children. She possesses master's degrees in education and counseling, she is a nationally certified and registered counselor, and she has received extensive training and clinical experience in the field of sexually abused children. We conclude that this litany of qualifications supports the trial court's decision to permit her to testify as an expert and that the court did not abuse its discretion in this regard.

Assuming arguendo that the trial court's failure to formally qualify the witness as an expert was an error, it was harmless error in the light of her qualifications, the court's obvious conviction that the witness was an expert, and the fact that the witness' opinion testimony fit within the

definition of expert testimony. It is undisputed that expert testimony is properly admissible when such testimony can assist the jury in drawing certain inferences from the facts because the expert is better qualified. The trial judge is afforded wide latitude and discretion when making a determination about the admissibility of such testimony. State v. Bullard, 312 N.C. 129, 322 S.E.2d 370. Defendant's assignment of error is rejected.

Defendant next assigns error to the trial court's failure to record the charge conference. N.C.G.S. sec. 15A-1231(b) provides that "[b]efore the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury." Defendant concedes that the

statute also requires a showing of prejudice in order for the failure to comply fully with this subsection to constitute grounds for appeal, but contends that, because the unrecorded charge conference prevented him from presenting any errors occurring during the conference, he was unable to obtain effective appellate review. Defendant contends that this is a proper basis for granting him a new trial.

The State submits that the record shows that at the conclusion of all of the evidence, the judge advised that he would make the standard charge to the jury and that neither side had any special request for instructions. At the conclusion of the instructions to the jury and before sending the jury the verdict sheet, the court inquired of

counsel whether either side had additions or corrections they wished to make. Both sides indicated that they were satisfied with the charge. Defendant therefore cannot show material prejudice, as required by the statute, from the failure to record the charge conference. We agree with the State and reject defendant's assignment of error.

Defendant also asserts that the charge conference was flawed because it was held outside of the presence of defendant, thus violating his constitutional right to be present at all stages of his trial. The State responds that because defendant was not excluded from the charge conference and did not request to be present and because his attorney attended it and made no objection to the procedure, defendant

waived his right to attend the conference. The State further contends that the charge conference only pertained to matters of law and did not take place in front of the jury; therefore, defendant's absence was not prejudicial error.

In State v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985), the trial court conducted a voir dire hearing on the admissibility of certain testimony outside the presence of both the jury and the defendant. This Court held that defendant's constitutional right to be present at all stages of the trial was a purely personal right that could be waived expressly or by his failure to assert it. The Court concluded that defendant waived his right to be present because he knew or should have known that

a hearing would be held, because neither defendant nor his counsel asserted his right to attend, and because his counsel was present at the hearing. The Court further held that any error made was harmless in light of the fact that defendant was present when the testimony was presented to the jury.

We find Braswell dispositive and conclude that, under these similar circumstances, error, if any, in excluding defendant from the charge conference was harmless. The right to be present at all critical stages of the prosecution is subject to harmless error analysis. Rushen v. Spain, 464 U.S. 114, 78 L. Ed. 2d 267 (1983), reh'g denied, 465 U.S. 1055, 79 L. Ed. 2d 730 (1984); Braswell, 312 N.C.553, 324 S.E.2d 241. Defendant's counsel was present during

the conference, and the trial court subsequently announced the proposed instructions on the record and gave defense counsel the opportunity to be heard. Furthermore, defendant was present when the actual charge was given to the jury and did not object to its contents. We hold that this assignment of error has no merit, and it is rejected.

Finally, defendant contends that the trial court erred in failing to charge the jury that it should infer from the State's failure to produce the medical examination performed by Dr. Furr that this evidence was not favorable to the State's position. Defendant asserts that the trial court also erred in failing to instruct on the ease of bringing charges

of sexual misconduct. We disagree with both contentions.

N.C.G.S. sec. 15A-1231(a) provides that if special instructions are desired, they should be submitted in writing to the trial judge. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides that if a party fails to object to a jury charge before the jury retires to consider its verdict, the objection is waived. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984). Furthermore, in the case sub judice, before allowing the jury to begin its deliberations, the trial judge announced that he would consider any requests for corrections to the charge "or any additional matters that either of you feel are necessary or appropriate to submit a proper and accurate charge to

the jury." Defense counsel replied that he had none. We further note that the State's failure to present evidence regarding Dr. Furr's examination would not have enabled the jury to draw the inference that the doctor's testimony would have been unfavorable to the State's case in light of the fact that defendant had an equal opportunity to call Dr. Furr but apparently did not because his findings corroborated those of Dr. Oliver.

In conclusion, we hold that defendant received a fair trial free of prejudicial error, and we reverse the decision of the Court of Appeals in which defendant was granted a new trial. The case is remanded to that court for further remand to the Superior Court, Cabarrus County, for reinstatement of the

sentence of mandatory life imprisonment imposed by the trial judge.

REVERSED.

CONSTITUTIONAL PROVISIONS

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and caused of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

AMENDMENT XIV.

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C. GEN. STAT. SEC. 15A-1231

(b) Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offense, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to fully comply with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.